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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HARNISCHFEGER CORPORATION,

Petitioner,

v.

HARBOR INSURANCE COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state rule prohibiting the citation of unpublished judicial opinions in that state's courts bars a federal court sitting in diversity from considering an unpublished state appellate opinion that constitutes the only evidence of state law on the issue before the federal court.

2. Whether a federal court sitting in diversity is obligated to follow relevant, unambiguous decisions of the supreme court of the state whose law applies, despite the age of those decisions and the federal court's preference for another rule, in the absence of any evidence that the state supreme court would no longer follow its decisions.

LIST OF PARTIES

The parties to the proceeding below were the petitioner Harnischfeger Corporation and the respondent Harbor Insurance Company.

RULE 29.1 STATEMENT

The parent company of Harnischfeger Corporation is Harnischfeger Industries, Inc. The subsidiaries of Harnischfeger Corporation (except wholly owned subsidiaries) are ABB HARNCO Inc.; Harnischfeger (UK) Limited; Harnischfeger GmbH; Harnischfeger of Australia Pty. Ltd.; and Harnischfeger do Brasil Comercio e Industria Ltda.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner Harnischfeger Corporation respectfully prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on March 18, 1991 and April 29, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 927 F.2d 974 and is reprinted in the Appendix at App. 1. The Order of the Court of Appeals for the Seventh Circuit denying Harnischfeger's petition for rehearing is reprinted in the Appendix at App. 13.

The Decision and Order of the District Court for the Eastern District of Wisconsin awarding Harbor summary judgment on Harnischfeger's complaint is unreported. It is reprinted in the Appendix at App. 14. The Order of the District Court for the Eastern District of Wisconsin denying Harnischfeger's motion to reconsider and awarding Harnischfeger summary judgment on Harbor's counterclaim is unreported. It is reprinted in the Appendix at App. 27.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on March 18, 1991. A timely petition for rehearing was denied on April 29, 1991.

Petitioner Harnischfeger Corporation invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1652. State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Wisconsin Rule of Appellate Procedure 809.23(3).

An unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of res judicata, collateral estoppel, or law of the case.

STATEMENT OF THE CASE

This Wisconsin diversity case concerned (1) when an insurer's liability attached under an excess liability policy and (2) whether the insurer could recover from its insured payments the insurer claimed to have made by mistake under the policy.

Petitioner Harnischfeger Corporation invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1332(a)(1). Harnischfeger is a Delaware corporation with its principal place of business in Wisconsin. Respondent Harbor Insurance Company is a California corporation with its principal place of business in California. The amount in controversy exceeded $600,000.

Harnischfeger is a manufacturer of cranes and mining equipment. Since 1979, Harnischfeger has maintained an insurance program for products liability claims designed to cap its total expenditures for such claims (including defense costs) at a fixed amount. The program consists of a self-insured retention defined by a primary insurance policy that counts defense costs toward its limits but requires reimbursement from Harnischfeger up to a certain level, followed by a series of excess umbrella policies that also count defense costs toward their limits and do not require reimbursement.

From 1979 to 1983, including the policy year 1980-81, Harnischfeger had a self-insured retention defined by a primary policy issued by Employers Insurance of Wausau. The Wausau policy expressly defined the limits of liability so that defense costs Harnischfeger incurred counted toward the exhaustion of the policy limits. (The Wausau policy appears in the record as Ex. B to R. 20.)

Harbor issued an excess umbrella policy to Harnischfeger for the policy year 1980-81. The limits of the Harbor policy were excess of "the limits of the underlying insurances as set out in the attached schedule in respect of each occurrence covered by said underlying insurances." The policy's "Schedule of Underlying Policies" listed the underlying products liability insurance as "SELF INSURED RETENTION." Although the Harbor policy did not specifically mention the Wausau policy, Harbor knew of the Wausau policy at the time of Harnischfeger's application to Harbor. (The Harbor policy appears in the record as Ex. A to R. 20.) The Harbor policy was renewed for the 1981-82 policy year.

In September 1986, Harnischfeger wrote Harbor that it had paid more than $3.6 million in "litigation expenses, judgments and settlements" for the 1980-81 policy year. Because the underlying limit of the Wausau policy was $3 million, Harnischfeger said, Harbor owed Harnischfeger some $600,000. Harnischfeger enclosed a computer print-out showing the breakdown of defense costs and settlements.

Two representatives from Harbor then reviewed the claims files at Harnischfeger's offices. At Harbor's request, Harnischfeger also provided a description of the expenditures in the order the files were closed. The expenditures were again broken down into "Litigation $" and "Settlement $."

In March 1987, Harnischfeger wrote Harbor that it was about to reach $3 million in "litigation expenses and settlement costs" for the 1981-82 policy year. As before, a computer print-out was provided showing the breakdown of defense costs and settlements.

The following month, Harbor took control of all open claims in the 1980-81 and 1981-82 policy years and began paying all litigation costs, settlements and judgments for those claims. However, Harbor continued to delay refunding Harnischfeger's overpayment for the 1980-81 policy year (although Harbor never disputed that its policy had attached), and in August 1987 Harnischfeger brought this action to recover it.

Meanwhile, Harnischfeger was involved in an action in Wisconsin state court with Republic Insurance Company, which had issued an excess umbrella policy to Harnischfeger for the policy years 1982-85. Like the Harbor policy, the Republic policy was excess to the Wausau policy. In August 1988, the Wisconsin trial court held that defense costs could not be counted in reaching the attachment point of the Republic policy.

Harbor immediately moved for summary judgment on the complaint in this action, citing the trial court's decision in *Republic* and contending for the first time that defense costs could not be counted in reaching the attachment point of its own policy. Harbor later filed an amended counterclaim seeking the return of all sums paid on Harnischfeger's behalf, asserting that the payments had been made by mistake. Those payments were claimed to total between $2.5 and $3.5 million.

In March 1989, the district court awarded summary judgment to Harbor on the attachment issue Harbor had raised, holding that defense costs did not count toward the attachment of the Harbor policy.

In June 1989, however, the Wisconsin Court of Appeals reversed the *Republic* trial court in an unpublished opinion, ruling that defense costs did count toward the attach-

ment of the Republic policy. *See Republic Ins. Co. v. Harnischfeger Corp.*, 151 Wis. 2d 556, 445 N.W.2d 58 (1989) (Table). (The opinion of the Wisconsin Court of Appeals is reprinted in the Appendix at App. 31.) In October 1989, the Wisconsin Supreme Court denied review. 449 N.W.2d 275 (Table).

Harnischfeger then moved the district court to reconsider its summary judgment decision in light of the decision of the Wisconsin Court of Appeals in *Republic*. In March 1990, however, the district court denied the motion. Because *Republic* was unpublished, the district court believed Wisconsin's non-citation rule prevented it from considering the decision. In the same order, the district court also awarded summary judgment to Harnischfeger on Harbor's counterclaim, holding that Harbor could not recover the payments made on Harnischfeger's behalf by mistake.

On appeal, the Seventh Circuit also refused to consider the *Republic* decision because it was unpublished and agreed that defense costs did not count toward the attachment of the Harbor policy. The Seventh Circuit affirmed the district court's decision on the counterclaim as to defense costs but held that Harbor could recover payments it had mistakenly made for judgments and settlements.

REASONS FOR GRANTING THE WRIT

This case raises important issues concerning the duty of the federal courts under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), to determine and apply state law in diversity cases.

Despite the absence of any other authority, the Seventh Circuit refused to consider as evidence of state law an unpublished Wisconsin appellate decision in a virtually identical case because of Wisconsin's non-citation rule. The circuits are split on whether federal courts must obey state non-citation rules in diversity cases.

On a separate issue, the Seventh Circuit refused to follow unambiguous decisions of the Wisconsin Supreme Court because it questioned the principles on which they were decided, although there was no evidence that Wisconsin would no longer follow those decisions.

A. The Seventh Circuit's Decision That Its Ability To Determine Wisconsin Law Was Limited By Wisconsin's Non-Citation Rule Presents An Important Issue For The Federal Courts.

The decision of the Wisconsin Court of Appeals in *Republic Ins. Co. v. Harnischfeger Corp.*, No. 88-1817 (Wis. Ct. App. June 21, 1989), was unmistakably relevant to the outcome of this case. The same issue was before both courts: whether defense costs incurred under a "self-insured retention" primary coverage arrangement should be included in reaching the attachment point of an excess umbrella liability policy. Both cases involved the same

primary insurance policy (the Wausau policy), the same insured (Harnischfeger) and functionally identical excess policies.

The district court and the Seventh Circuit refused to consider *Republic*, however, because the opinion was unpublished. Rule 809.23(3) of the Wisconsin Rules of Appellate Procedure, Wis. Stat. § 809.23(3), states that an unpublished opinion has no precedential value and may not be cited as precedent or authority in a Wisconsin court. Because of this rule, the Seventh Circuit concluded, "[a] non-case for Wisconsin's own purposes is a non-case in federal courts under *Erie*." 927 F.2d at 976.

The Seventh Circuit's conclusion about the effect of Wisconsin's non-citation rule under *Erie* was incorrect. The duty of the federal courts in diversity cases is "to ascertain *from all the available data* what the state law is . . . ." *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940) (emphasis added). Those data include decisions of a state's intermediate appellate court and its trial courts. In the absence of guidance from a state's highest court, decisions by other courts of the state must be given "proper regard." *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967). Even an unpublished lower court opinion is entitled to some weight. *King v. Order of United Commercial Travelers*, 333 U.S. 153 (1948).

The Seventh Circuit's assumption that it was bound by a state non-citation rule mistook the fundamentally different roles of a state court deciding a case without the benefit of applicable state law and a federal court sitting in diversity under the same handicap. Although a federal court in diversity is sometimes said to sit "as a state court," a state court, even a state trial court, is free to

make state law. A federal court can never make or change state law but is limited to predicting how the state's highest court might rule. *Salve Regina College v. Russell*, ____ U.S. ____, ____, 111 S. Ct. 1217, 1227 (1991) (Rehnquist, C.J. dissenting). No Wisconsin case interpreting Wisconsin law in an area where the Wisconsin Supreme Court has yet to rule can ever be a "non-case" for a federal court attempting to ascertain and apply Wisconsin law.

Ordinarily, the decision of an intermediate appellate state court "is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *West*, 311 U.S. at 237. All state decisions at a minimum must be given "proper regard." *Bosch*, 387 U.S. at 465. The *Republic* case constituted the only available data on Wisconsin law, and the Wisconsin Supreme Court had denied review. It at least had to be given "proper regard." It could not simply be disregarded.[1]

Furthermore, as a result of the Seventh Circuit's insistence that it was bound by Wisconsin's non-citation rule,

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[1] The Seventh Circuit also purported to distinguish *Republic*, asserting that "Republic's policy contains language different from Harbor's." 927 F.2d at 976. However, the Seventh Circuit did not describe what language in the two policies was different or how the difference called for the opposite result in this action.

The *Republic* court found it "crystal clear," based on "Endorsement 1 and Conditions 5 and 11" of the Republic policy, that the policy "attaches when the underlying insurance is exhausted." The equivalent provisions of the Harbor policy—the Schedule of Underlying Policies, Limits of Liability and Loss Payable Condition—are functionally identical to their Republic counterparts.

Harnischfeger has been subjected to inconsistent results over two essentially identical insurance policies simply because one was litigated in state court and the other in federal court. One of the goals of *Erie*, however, is "doctrinal coherence." *Salve Regina College*, 111 S. Ct. at 1222. As this Court explained in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), *Erie* was intended to ensure that in a diversity case "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court." *Id.* at 109.

The federal courts have struggled since *Erie* with the problem of determining state law when state law is unsettled. It has been nearly 25 years since this Court last addressed the question of what sources a federal court may properly consider in determining state law. *See Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967).

Since *Bosch*, access to legal information has been revolutionized. Computerized data bases for legal research that did not exist in 1967, such as Lexis and Westlaw, have become commonplace. Specialized loose-leaf services have multiplied. As a result, so-called "unreported" opinions are now routinely available to lawyers and litigants. For example, although the *Republic* decision is "unreported" in the sense that it has not been included in the official Wisconsin reports, it is available on Lexis (States library, Wisc file) and on Westlaw (WI-CS file), and it also appears at [1989-90] Fire & Casualty Cas. (CCH) ¶ 1997.

Since 1967, as well, an increasing number of courts have adopted selective publication rules and their corollaries,

non-citation rules. By 1989, more than half the states had rules limiting the precedential value of unpublished decisions by their courts or directing that those decisions not be cited at all. Beyler, *Selective Publication Rules: an Empirical Study*, 21 Loy. U. Chi. L.J. 1, 6 (1989).

The selective publication of judicial opinions is itself controversial. *See, e.g., County of Los Angeles v. Kling*, 474 U.S. 936, 938 (1985) (Stevens, J., dissenting) ("[The Ninth Circuit's] decision not to publish the opinion or permit it to be cited—like the decision to promulgate a rule spawning a body of secret law—was plainly wrong."); Marcotte, *Unpublished but Influential*, A.B.A.J., Jan. 1991, at 26-28; Render, *On Unpublished Opinions*, 73 Ky. L.J. 145 (1984-85); Walther, *The Noncitation Rule and the Concept of Stare Decisis*, 61 Marq. L. Rev. 581 (1978).

And "[t]he non-citation rule is perhaps the most controversial aspect of the selective publication procedure." Smith, *The Selective Publication of Opinions: One Court's Experience*, 32 Ark. L. Rev. 25, 31 (1978); *see also* P. Carrington, D. Meador & M. Rosenberg, *Justice On Appeal* 35-41 (1976); Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167, 1179-80 (1978); Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change 51 (1975) ("Perhaps the thorniest [problem which results from non-publication] involves the question whether or not to allow unpublished opinions to be cited as precedent.").

With growing numbers of state non-citation rules and ever greater availability of "unpublished" opinions, the

question of whether federal courts are bound by state non-citation rules in diversity cases will arise with increasing frequency. Federal courts and litigants urgently need an answer that establishes a coherent and consistent approach to state non-citation rules.

B. The Circuits Are In Conflict Over The Status Of State Non-Citation Rules.

Decisions of the courts of appeals differ over the application of state non-citation rules in diversity cases. Like the Seventh Circuit, the Fifth Circuit has refused to consider an unreported state appellate opinion, "because under Texas law an unreported opinion is not precedential." *Exxon Co. v. Banque de Paris et des Pays-Bas*, 889 F.2d 674, 675 (5th Cir. 1989), *cert. denied*, ____ U.S. ____, 110 S. Ct. 3230 (1990).

Three circuits have reached the opposite result. In *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145 (3d Cir. 1988), the Third Circuit held that the New Jersey non-citation rule was, "of course, binding only on the New Jersey courts" and declared: "[W]e would be remiss in our duty to apply New Jersey law were we to ignore a New Jersey case where the relevant issue is identical." *Id.* at 152 n.6. In *McSherry v. Block*, 880 F.2d 1049 (9th Cir. 1989), *cert. denied*, ____ U.S. ____, 111 S. Ct. 1404 (1991), the Ninth Circuit followed a California appellate decision interpreting a state statute despite an order by the California Supreme Court removing the decision from publication.[2] Citing this Court's decision in *King v. Order of United Commercial Travelers*, the Ninth Circuit held

[2] Rule 977(a) of the California Rules of Court prohibits the citation of unpublished opinions.

that "we may not summarily disregard the Appellate Department's construction of section 653g merely on the basis that its construction was rendered in an unpublished opinion." *Id.* at 1053 n.2; *accord*, *Aviles v. Burgos*, 783 F.2d 270, 283 n.4 (1st Cir. 1986) (relying on unpublished judgment of Puerto Rico Supreme Court despite non-citation rule where opinion was "well-reasoned" and "all the parties have had access" to it.).

There appears to be confusion over the Wisconsin non-citation rule even within the Seventh Circuit itself. In this case, the Seventh Circuit held that it was bound by the rule, and Judge Easterbrook, writing for the court, asserted that the court had "respected that embargo" before in *Cole v. Young*, 817 F.2d 412 (7th Cir. 1987). In *Cole*, however, Judge Easterbrook vigorously dissented, arguing that an unpublished Wisconsin appellate opinion had in fact overruled an earlier, published opinion, and that the Seventh Circuit was bound to follow the more recent unpublished opinion. 817 F.2d at 428-35. Despite Wisconsin's non-citation rule, moreover, the district courts in Wisconsin have sometimes considered unpublished trial court decisions as evidence of state law. *See Bornstein v. Fireman's Fund Ins. Co.*, 623 F. Supp. 814 (E.D. Wis. 1985); *E.A. Dickinson & Assoc., Inc. v. Simpson Elec. Co.*, 509 F. Supp. 1241 (E.D. Wis. 1981).

Without this Court's direction on whether state non-citation rules must be followed in diversity cases, litigants in different circuits will continue to be subjected to inconsistent standards for the determination of state law.

C. The Seventh Circuit's Refusal To Follow Decisions Of The Wisconsin Supreme Court Violated *Erie* And Infringed Upon Wisconsin's Right To Make Its Own Law.

Harbor's counterclaim in the district court sought as much as $3.5 million Harbor had paid after what Harbor claimed was its mistaken conclusion, despite full knowledge of the facts, that its policy had attached. Under Wisconsin law, payments made because of a mistake of law cannot be recovered. *See Shirley v. City of Waukesha*, 124 Wis. 239, 102 N.W. 576 (1905); *Gage v. Allen*, 89 Wis. 98, 61 N.W. 361 (1894); *Birkhauser v. Schmitt*, 45 Wis. 316 (1878).[3] On the other hand, Wisconsin permits recovery where the mistake was one of fact but defines mistake of fact restrictively. *See Grand Trunk Western R. v. Lahiff*, 218 Wis. 457, 261 N.W. 11 (1935); *Meeme Mut. Home Protection Fire Ins. Co. v. Lorfeld*, 194 Wis. 322, 216 N.W. 507 (1927). These are traditional, common law rules. *See* 70 C.J.S. *Payment* §§ 113-14 (1987).

The Seventh Circuit acknowledged the Wisconsin distinction between mistakes of fact and law but complained that no case "discusses the principles that would lead a court to prefer one characterization over another." 927 F.2d at 977. "Why," asked the Seventh Circuit,

> should Wisconsin try to pick through cases of mistaken payments, allowing insurers to recoup some but not others? Harnischfeger suggests no reason at all; it parrots language in a few ancient cases and suggests that we turn off all higher mental centers. Why? . . .

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[3] Payments an insurer makes because of a misinterpretation of its own policy are payments made under a mistake of law and have been held not recoverable. *See, e.g., The Hartford v. Doubler*, 105 Ill. App. 3d 999, 434 N.E.2d 1189 (1982).

> Does Wisconsin want to induce insurers to play coy when their clients ask for assistance?

Id. The court answered these questions by fashioning its own rule of equity, apparently believing it to be sounder and more principled than established Wisconsin law.[4]

The Seventh Circuit's refusal to follow long-standing decisions of the Wisconsin Supreme Court, simply because the Seventh Circuit disagreed with them, was impermissible. Under *Erie*, a federal court must follow unambiguous state law as defined by the state's highest court "[e]ven if, by the lights of the federal court or the courts of other states, a rule of law as announced by a state's highest court is anomalous, antiquated or simply unwise . . . ." 19 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4507 at 91-92 (1982). A federal court's function under *Erie* "is to ascertain what the state law is, not what it ought to be." *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

Although a federal court may sometimes be justified in not following a relevant state supreme court decision, *see Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956) (dictum), to do so requires a particularly strong showing. A federal court can ignore a decision of the state supreme court only if there are "very persuasive grounds" for believing that court would not adhere to its decision. 19 C. Wright, A. Miller & E. Cooper, *supra*, § 4507 at 92. As the Seventh Circuit itself has declared, a federal court

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[4] The Seventh Circuit questioned the wisdom of Wisconsin law, but the effect of the Seventh Circuit's decision is to permit an insurer to change its mind about the meaning of its policy after paying a loss and get the money back. The decision places on the insured the risk that the insurer, despite the insured's full disclosure of the facts, will misunderstand and misapply its own policy.

owes the same deference to a state supreme court decision as it does to the decisions of this Court and must follow that decision unless "powerfully convinced" the decision would be overruled "at the first opportunity." *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987).[5]

The Seventh Circuit offered no "very persuasive grounds" for believing Wisconsin would not continue to follow the common law rules for payments by mistake. As evidence of an imminent change in Wisconsin law, it cited a single 1935 case, *Grand Trunk Western R. v. Lahiff*, 218 Wis. 457, 261 N.W. 11 (1935), in which, the Seventh Circuit merely asserted, Wisconsin had "remarked this problem" of distinguishing between mistakes of law and fact. 927 F.2d at 977. Moreover, the Seventh Circuit misread *Lahiff*. The court in *Lahiff* never questioned the mistake of law/mistake of fact distinction but simply observed that "[c]ourts have met great difficulties in the attempt adequately to define the term 'mistake of fact' . . . ." 218 Wis. at 461, 261 N.W. at 12-13. The *Lahiff* court went on to offer its own definition of mistake of fact, *id.* at 463, 261 N.W. at 13, an undertaking inconsistent with a belief that the distinction between mistakes of law and fact was no longer significant.

The Seventh Circuit also referred generally to "other Wisconsin cases" supposedly signalling a change in the law, 927 F.2d at 978, but it did not cite them, and Harnischfeger is unaware of any such cases. After *Lahiff*, the Wisconsin Supreme Court referred to the mistake of fact rule in *George J. Meyer Mfg. Co. v. Howard Brass & Copper Co.*, 246 Wis. 558, 18 N.W.2d 468 (1945), and again

[5] It is not enough that the state supreme court decisions are "ancient." *See Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956) (federal court was bound by 1910 decision); *In re Ryan*, 851 F.2d 502 (1st Cir. 1988) (federal court was bound by 1869 decision).

in *Amalgamated Ass'n of Street Electric Ry. & Motor Coach Employees v. Danielson*, 24 Wis. 2d 33, 128 N.W. 2d 9 (1964).[6] As late as 1964, Wisconsin was operating within the same common law framework as it had in the nineteenth century.

A federal court sitting in diversity should be sensitive to trends in state law, *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956), but a federal court is not entitled to grasp at straws simply to achieve its own concept of a just result. As the Fifth Circuit remarked in *Ideal Structures Corp. v. Levine Huntsville Dev. Corp.*, 396 F.2d 917 (5th Cir. 1968), "[o]ur *Erie* antenna is not so sensitive that we can gauge every variant breeze of change. Forecasting the repudiation of a fixed legal principle is not simplistic." *Id.* at 922. "Though federal courts should keep abreast with imminent change," the court said, "our footing should be reasonably sure if not absolutely certain." *Id.* at 924. There was no basis at all for believing the decisions of the Wisconsin Supreme Court were no longer good law.

The Seventh Circuit's treatment of Wisconsin law in this case was a throwback to the era of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). Before *Erie* overruled *Swift*,

> [l]aw was conceived as a "brooding omnipresence" of Reason, of which decisions were merely evidence and not themselves the controlling formulations. Accordingly, federal courts deemed themselves free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State law . . . .

[6] The Seventh Circuit also noted an inconsistency in sections of the Restatement of Restitution (1936), and stated that "the American Law Institute doubts the existence of a tenable line" between mistakes of law and fact. 927 F.2d at 977. The American Law Institute, however, cannot overrule the Wisconsin Supreme Court, nor is the Restatement an authoritative indicator of the direction of Wisconsin law.

Guaranty Trust Co. v. York, 326 U.S. 99, 102 (1945). As if *Swift* had never been overruled, the Seventh Circuit, unsatisfied with "authoritatively declared" Wisconsin law, rejected decisions of Wisconsin's highest court because it disagreed with them ("Why should Wisconsin try to pick through cases of mistaken payments . . . ?") and formulated a rule based on its own concept of what "Reason, and therefore Law, required."

Only last year this Court reaffirmed that "[t]he *Erie* rule remains a vital expression of the federal system and the concomitant integrity of the separate States." *Ferens v. John Deere Co.*, 494 U.S. 416, ____, 110 S. Ct. 1274, 1280 (1990). For a federal court "to disregard the law of the State" is "nothing less than an attempt to control the State in a matter in which the State is not amenable to Federal authority . . . ." *Baltimore & O. R. v. Baugh*, 149 U.S. 368, 397 (1893) (Field, J., dissenting). Interference with state law, except in matters the Constitution delegates to the United States, " 'is an invasion of the authority of the State and, to that extent, a denial of its independence.' " *Id.* at 401, *quoted in Erie*, 304 U.S. at 79.

Although this Court generally defers to determinations of state law by the courts of appeals, *Cort v. Ash*, 422 U.S. 66, 72 n.6 (1975), no deference is due where a lower federal court usurps the power of a state to set its own policy and make its own law. The Seventh Circuit's rejection of decisions of the Wisconsin Supreme Court, in the absence of any evidence suggesting those decisions would no longer be followed, violated Wisconsin's sovereignty. Because of the important considerations of federalism at stake, this Court should grant certiorari to review the decision of the Seventh Circuit.

CONCLUSION

For the foregoing reasons, the petitioner Harnischfeger Corporation respectfully requests that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 90-2104 and 90-2162

HARNISCHFEGER CORPORATION,

Plaintiff-Appellant, Cross-Appellee,

v.

HARBOR INSURANCE COMPANY,

Defendant-Appellee, Cross-Appellant.

Appeals from the United States District Court
for the Eastern District of Wisconsin.
No. 87-C-958—**Terence T. Evans,** *Judge.*

ARGUED JANUARY 15, 1991—DECIDED MARCH 18, 1991

Before FLAUM, EASTERBROOK, and MANION, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Harbor Insurance Company sold Harnischfeger Corporation excess policies for 1981 and 1982, which "shall not attach unless and until [Harnischfeger or its insurer] shall have paid the amount of the underlying limits on account of such occurrence." Another provision defined the underlying limits as "$1,000,000.00 combined single limit each occurrence[,] $3,000,000.00 combined single limit in the aggregate". Harnischfeger obtained this coverage from "self insured retention". Harbor contracted with Employers Insurance of Wausau for administration of its obligations, and its con-

tract with Wausau limited that firm to $3 million of outlay including legal fees and costs. When Wausau had paid $3 million including legal fees for each of the coverage years, Harnischfeger tendered to Harbor the defense of claims against it. We must decide whether Harbor's policy kicks in when Harnischfeger (through Wausau) is out of pocket $3 million, or only when it has paid $3 million in claims. (Harbor issued policies covering two years: November 1, 1980, to October 31, 1981, and November 1, 1981, to October 31, 1982. We simplify by referring to only one policy and by abbreviating the periods to 1981 and 1982.)

Harbor relies on the "loss payable" paragraph of the policy, which we have quoted. It adds that in the insurance business underlying limits are understood to mean sums paid to claimants, and not the insured's out-of-pocket expenses. A policy with a $1 million limit means $1 million of indemnity; an insured would be flabbergasted if its underwriter paid $500,000 on a $1 million policy and then asserted that it had reached the "policy limits" given the costs of defense. Just so, Harbor insists, with limits underlying an excess policy. The excess policy takes up where the primary policy leaves off, and if the primary policy provides (or is supposed to provide) a given amount of indemnity, then the excess insurer's obligation is postponed until that sum has been paid. The district court agreed and awarded summary judgment to Harbor.

Harnischfeger does not deny any of this. It argues instead that Harbor wrote a non-standard policy, yielding a non-standard result. One clause, captioned "limit of liability", says that Harbor "shall only be liable for the Ultimate Net Loss, the excess of . . . the limits of the underlying insurances as set out in the attached schedule". Another, captioned "ultimate net loss", defines that term to mean "the total sum which the Insured . . . become[s] obligated to pay by reason of personal injuries . . . and shall also include . . . expenses for doctors, lawyers, nurses and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits". Harbor thus agreed to pay $10 million of "ul-

timate net loss", including legal costs. Because the "limit of liability" clause also refers to "ultimate net loss", Harnischfeger argues that it was invited to define the primary coverage to include legal fees. Moreover, the "limit of liability" clause keys Harbor's exposure to the "limits of underlying insurances"; it obtained insurance from Wausau that measures the firm's exposure by reference to out-of-pocket costs. That definition was incorporated into Harbor's policy, Harnischfeger contends, by the "limit of liability" clause.

This is clever but no more persuasive to us than it was to the district judge. Harnischfeger essentially contends that the "limit of liability" clause gave it a free hand: it could count against the $3 million anything that it put in the agreement with Wausau. No (sane) insurer would give its insured such an option, certainly not in such a backhanded manner. After all, the clause in question is called "*limit* of liability". Its function is to say that Harbor will pay *no more than* a specified amount—the "ultimate net loss", commencing on exhaustion of the primary insurance. Clauses of limitation do not obligate insurers to pay. *Continental Casualty Co. v. Pittsburgh Corning Corp.*, 917 F.2d 297, 300 (7th Cir. 1990). Harbor's promise to pay comes in the "loss payable" paragraph, which says that its obligation does not "attach" until Harnischfeger or its primary insurer has "paid the amount of the underlying limits". These are $1 million per occurrence, $3 million total, without any suggestion that the primary limits are the same as "ultimate net loss". The special meaning of "ultimate net loss" was employed to curtail Harbor's total exposure; nothing in the structure of the policy or the text of its clauses suggests that it is also designed to trigger Harbor's exposure before $3 million in indemnity has been paid.

Harbor's policy describes Harnischfeger as a self-insurer, which it was. Wausau played an administrative role; Harnischfeger promised to reimburse it and pay a fee to boot. True, Wausau would have been on the hook had Harnischfeger become unable to repay. But so long as Harnisch-

feger remained solvent, Wausau was selling not insurance but expertise in valuing and resolving claims. How much of this service Harnischfeger purchased from Wausau does not alter Harbor's obligations as an excess carrier.

Harnischfeger insists that no matter what we may think of the subject, Wisconsin has determined that its legal expenses count toward the limits of its primary coverage. *Republic Insurance Co. v. Harnischfeger Corp.*, No. 88-1817 (Wis. App. June 21, 1989), review denied, 449 N.W.2d 276 (1989), allows Harnischfeger to count legal expenses toward the primary limits of an excess policy it secured from another carrier for 1982-83. Under *Erie*, Harnischfeger maintains, we must reach the same decision concerning Harbor's policy. The district judge thought otherwise, as do we, for two reasons. First, Republic's policy contains language different from Harbor's. The court of appeals interpreted the language of Republic's policy without establishing a general rule. What is more, the opinion is unpublished. Wisconsin has a judicial committee in charge of publication, and the decision is made by judges other than those responsible for the opinion. Sometimes an election not to publish reflects a belief that the opinion is old hat and not worth space in the reporters; sometimes nonpublication stems from a belief that the opinion is questionable on the merits. Such a system implies a ban against reliance on unpublished opinions, Wis. Stat. 809.23(3); *Tamminen v. Aetna Casualty & Surety Co.*, 109 Wis. 2d 536, 327 N.W.2d 55 (1982), and we have respected that embargo. *Cole v. Young*, 817 F.2d 412, 420 (7th Cir. 1987). A noncase for Wisconsin's own purposes is a non-case in federal courts under *Erie*.

All that remains is Harnischfeger's invocation of the principle that ambiguities must be resolved against insurers, a doctrine entrenched in Wisconsin. *Wood v. American Family Mutual Insurance Co.*, 148 Wis. 2d 639, 436 N.W. 2d 594 (1989). Taken to its limits, this doctrine could obliterate exclusions in insurance policies. For language always leaves *some* ambiguities, whether verbal (intrinsic) or situational (extrinsic). Drafters cannot anticipate all pos-

sible interactions of fact and text, and if they could the attempt to cope with them in advance would leave behind a contract more like a federal procurement manual than like a traditional insurance policy. Insureds would not be made better off in the process. The resulting contract would be not only incomprehensible but also more expensive.

It is no surprise, then, that neither Wisconsin nor any other state carries the principle to its limits. There must be genuine (meaning, substantial) uncertainty, not resolvable by other means, and the insured's proposed reading must be reasonable. E.g., *Stanhope v. Brown County*, 90 Wis. 2d 823, 280 N.W.2d 711 (1979). Rules of interpretation are tie-breakers, even when the words being interpreted appear in insurance policies. *Continental Casualty*, 917 F.2d at 300; *Harbor Insurance Co. v. Continental Bank Corp.*, 922 F.2d 357, 366 (7th Cir. 1990). Harnischfeger and Harbor have not fought to a draw; no tie requires resolution. Perhaps the interpretive principle could be recast as one requiring the insurer to come forth with information in its possession but unknown to the insured. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87 (1989). Wisconsin has not suggested this understanding of its approach, perhaps because it doubts judicial ability to determine how much information is optimal; there is always "more", and the evolution of "warning" (i.e., disclosure) claims in the law of products liability provides ground to doubt that the principle could be confined. Be that as it may, the missing information in this contractual relation concerned the Harnischfeger-Wausau policy, which supplies no basis for construing anything against Harbor.

Our conclusion that Harbor is responsible only after Harnischfeger pays out $3 million in claims sets the stage for the second facet of this dispute. Harbor seeks to recover from Harnischfeger sums that it has paid to claimants and legal counsel after assuming the defense prematurely. For simplicity we disregard the 1982 policy year and concentrate on 1981. Harnischfeger wrote Harbor in

1986, contending that it had spent more than $3.6 million on account of claims arising out of transactions during the 1981 policy year. It asked Harbor to reimburse it $623,060 and to assume the defense of open claims. Harbor asked for documentation; Harnischfeger provided a computer printout showing, case by case, how much had been paid to claimants and how much to legal counsel. The computer also totaled the columns, showing $2,392,919 in claims paid and $1,230,141 in litigation expenses. Harbor then assumed control of the cases. It now wants Harnischfeger to reimburse it for the expenses it would have avoided had it waited until the claims paid column reached $3 million.

In the district court the parties debated whether Harbor's acceptance of the defense in 1986—when, we have just held, it did not have to—was a mistake of "fact" or "law". The district court concluded that if Harbor made an error of "law" it is not entitled to recoup its loss, but that if it made an error of "fact" it may do so. After characterizing the blunder as one of "law" the district court sent Harbor away empty-handed.

Most disputes involve questions of both fact and law. Courts apply law to facts, producing judgments. Harbor needed to do the same before accepting or rejecting Harnischfeger's tender. Before deciding whether it was responsible as an excess carrier, Harbor had to examine the contract, Wisconsin's legal rules, and the facts concerning payments to date. Such an activity cannot be sorted neatly into bins marked "fact" and "law". Wisconsin has remarked this problem, *Grand Trunk Western R.R. v. Lahiff*, 218 Wis. 457, 461, 261 N.W. 11, 12-13 (1935), and the American Law Institute doubts the existence of a tenable line. *Restatement of Restitution* 179-81 (1936). Two sections of the *Restatement* illustrate the problem. Section 18 allows restitution following a payment made in the mistaken belief that a contract requires payment, yet §45 illustration 2 disallows restitution in the same circumstance; the difference between the two is the characterization of the latter mistake as one of law.

You cannot answer a question without knowing the function of the inquiry. Why should Wisconsin try to pick through cases of mistaken payments, allowing insurers to recoup some but not others? Harnischfeger suggests no reason at all; it parrots language in a few ancient cases and suggests that we turn off all higher mental centers. Why? If Harbor cannot recover in situations like this one, then it will resolve all close cases against coverage. If Harnischfeger is right, Harbor should have balked when asked to take over the defense—and insurers will balk in the future, compelling their insureds to pay up front and bring suit to recover. Insureds would not count this a gain; we think it likely that insureds would prefer to have their insurers take over immediately (as Harbor did) and settle accounts later (as Harbor has tried to do). Does Wisconsin want to induce insurers to play coy when their clients ask for assistance?

None of the cases we could find implies an affirmative answer. Although several opinions state that there is a distinction between factual and legal errors, e.g., *Gage v. Allen*, 89 Wis. 98, 61 N.W. 361 (1894); *Conway v. Town of Grand Chute*, 162 Wis. 172, 174, 155 N.W. 953, 954 (1916) (dictum), none discusses the principles that would lead a court to prefer one characterization over another. Later cases are more functional, and these omit any suggestion of a clean line. For example, *Lahiff* allowed an insurer to recover a sum paid to the spouse of a person who both the insurer and the spouse believed had died in an accident, after the court determined that the deceased was someone else. The court observed that settlements of genuine disputes should not be undone just because one party later discovers an error. Settlements, after all, apportion between the parties the uncertainties involved; their function would be destroyed if after the uncertainties have been resolved one side can point to an "error" and recoup. In *Lahiff*, however, there was a mutual mistake of fact and no attempt to compromise a dispute; the court ordered restitution. Several other Wisconsin cases are in this vein; each tries to promote compromises by

preventing second-guessing, while allowing restitution in other cases.

Amalgamated Ass'n of Street Electric Ry. Employees v. Danielson, 24 Wis. 2d 33, 128 N.W.2d 9 (1964) (Fairchild, J.), discusses a second limit on recoupment: detrimental reliance. An insurer paid twice and tried to recover the second payment. The court allowed it to do this, except to the extent the recipient had changed position (by paying a debt) in reliance on receipt of the money. *Danielson*, citing §69(1) of the *Restatement*, emphasized that restitution is an equitable remedy and allowed the payor to recover only part of the excess. Difficulties in determining what would have happened, had the erroneous payment not been made, provide additional equitable reasons to limit recoupment.

Harnischfeger and Harbor did not in 1986 compromise any dispute between them. True, Harbor overlooked the significance of the printout when stepping in, but this error does not block restitution. *Lahiff* held that is it not relevant that the insurer would not have made the mistake had it conducted a better investigation. 261 N.W. at 14. See also *Restatement* §59 ("A person who has conferred a benefit upon another by mistake is not precluded from maintaining an action for restitution by the fact that the mistake was due to his lack of care."). To treat Harbor's error as an absolute bar would be to compel an insurer to reserve its rights expressly as a condition of recoupment, a position Wisconsin has abandoned. *Shannon v. Shannon*, 150 Wis. 2d 434, 442 N.W.2d 25, 32-35 (1989); *Utica Mutual Insurance Co. v. Klein & Son, Inc.*, 460 N.W.2d 763, 768 (Wis. App. 1990). Any obstacles to restitution in this case are equitable, rather than threshold bars.

When it tendered the defense of the 1981 cases to Harbor, Harnischfeger was about $600,000 short of exhausting the limits of its primary responsibility. Had Harnischfeger waited, it would have incurred costs at least this high. Since taking over the claims, Harbor has paid a great deal

more than $600,000 to injured persons, and Harnischfeger does not contend that had it retained responsibility for the cases it could have resolved them all for a total of less than $3 million. It follows that Harnischfeger has received a windfall of at least $607,081. Principles of restitution allow Harbor to recover that amount, and an equivalently computed sum for the 1982 policy year.

Legal fees are a more complex subject. Had Harnischfeger waited until its payments to claimants reached $3 million before turning the files over to Harbor, Harnischfeger would have incurred substantial additional legal expenses. The ratio of compensation to legal fees reflected in the printout is approximately two to one, implying that by tendering early Harnischfeger saved itself not only the $607,081 in indemnity but also another $300,000 or so in expenses. Harbor bore these in its stead and asks for recompense. But computation of this sum is not nearly so clean as computation of the indemnity. Had it known that Harbor would deny all responsibility until $3 million has been paid to claimants, Harnischfeger might have settled the largest remaining cases promptly and turned the rest over to Harbor with very small additional legal expenses. Harbor, for its part, insists that the $600,000 gap was very expensive to handle. Several cases, it says, were on the verge of trial when Harnischfeger tendered the defenses in 1986. Had Harnischfeger clung to these cases during trial, it would have incurred fees substantially exceeding $300,000, fees that the premature tender foisted on Harbor. Harnischfeger replies that Harbor could have defended these cases for a lot less than it actually paid to its lawyers, to which Harbor responds that it retained the same law firms Wausau had engaged to handle the cases, so that their bills are solid evidence of the expenses Harnischfeger avoided.

Resolving these contentions would require a shot in the dark. How much benefit, in lower legal expenses, did Harnischfeger receive when Harbor assumed the defenses before it was required to? The answer could range from a few thousand dollars (if Harnischfeger would have settled

quickly to get over the threshold) to several million dollars (Harbor's demand in this suit). Harbor could have avoided this problem by taking greater care when Harnischfeger tendered the defenses—not by refusing to step in, but by obtaining some agreement about how expenses would be apportioned in the event a court should conclude that the underlying limits in the policy excluded legal costs. Uncertainty is Harbor's creation. Harnischfeger hid nothing when proffering the case files. The printout showed that it had not yet paid $3 million to claimants. Wisconsin, we believe, would apply the equitable principles of the *Restatement* to leave the burden of uncertainty with Harbor. Harbor is entitled to restitution of the difference between $3 million and the amount Harnischfeger paid to claimants in each policy year, but Harbor must bear its own legal expenses.

On Harnischfeger's appeal, No. 90-2104, the judgment is affirmed. On Harbor's appeal, No. 90-2162, the judgment is affirmed to the extent it denies Harbor's claim for restitution of legal expenses and reversed to the extent it denies Harbor's claim for restitution of the indemnity it was not contractually obliged to provide. The case is remanded for computation of this sum.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: March 18, 1991

BEFORE:
Honorable Joel M. Flaum, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge

Nos. 90-2104 and 90-2162

HARNISCHFEGER CORPORATION,
Plaintiff-Appellant, Cross-Appellee

v.

HARBOR INSURANCE COMPANY,
Defendant-Appellee, Cross-Appellant

Appeals from the United States District Court for the Eastern District of Wisconsin
No. 87 C 958, Judge Terence T. Evans

These causes were heard on the record from the above mentioned district court, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in these causes appealed from be, and the same are hereby, AFFIRMED as to No. 90-2104; and AFFIRMED as to No. 90-2162 to the extent it denies Harbor's claim for restitution of legal expenses, REVERSED

to the extent it denies Harbor's claim for restitution of the indemnity it was not contractually obliged to provide, and REMANDED for computation of this sum, in accordance with the opinion of this Court filed this date. There will be no award of costs in this Court.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 29, 1991.

Before

Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

HARNISCHFEGER CORPORATION,

Plaintiff-Appellant, Cross-Appellee,

Nos. 90-2104 and 90-2162 v.

HARBOR INSURANCE COMPANY,

Defendant-Appellee, Cross-Appellant.

Appeals from the United States District Court
for the Eastern District of Wisconsin.
No. 87-C-958—Terence T. Evans, *Judge.*

Order

Plaintiff-Appellant, Cross-Appellee filed a petition for rehearing and suggestion of rehearing en banc on April 15, 1991. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

App. 14

[FILED MARCH 8, 1989]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

HARNISCHFEGER CORPORATION,

Plaintiff,

v.

Civil Action
No. 87-C-958

HARBOR INSURANCE COMPANY,

Defendant.

DECISION and ORDER

In October 1988, Harnischfeger and Harbor Insurance each asked for partial summary judgment in this diversity contract dispute. After additional briefing done at my request, the dispute is now ripe for resolution. For the reasons explained below, I find in favor of Harbor.

FACTS

The facts of the case, though summarized in my order of January 5, 1989, are detailed here.

In 1980 and 1981, Harnischfeger, a Wisconsin corporation, was covered by an umbrella insurance policy issued by Harbor, a California corporation. The policy was intended to kick in—or "attach"—when Harnischfeger's first-line insurance had paid out $1,000,000 per occurrence, or $3,000,000 in the aggregate, on account of products liability claims. Harnischfeger's underlying products liability insurance was in fact self-insurance administered through Employers Insurance of Wausau. Employers would cover claims and related costs up to $1,000,000 (or $3,000,000

total), and Harnischfeger would reimburse Employers and pay that company a fee for its services. This primary "policy" declared that legal fees would count toward the $1,000,000 and $3,000,000 limits.

When Harnischfeger had spent $3,000,000 *including* legal fees, it asked Harbor to cover additional claims and legal expenses. Harbor, though, said the umbrella policy's magic number could not be reached by including legal fees. According to Harbor, it became liable only when Harnischfeger, through Employers, had paid out $1,000,000 or $3,000,000 of indemnity—that is, in payments to claimants. Harbor has resisted covering about $650,000 that Harnischfeger has spent in connection with products liability claims.

The Harnischfeger/Harbor policy provided $10,000,000 in coverage for a $140,000 annual premium. Being an umbrella policy, it contained a "Schedule of Underlying Policies." Companies other than Harbor were named as providing underlying coverage for certain risks, but the entry pertinent to this case stated:

COMPANY	POLICY NO.	COVERAGE		LIMITS
SELF INSURED RETENTION		PRODUCTS/ COMPLETED OPERATIONS LIABILITY	BODILY INJURY AND PROPERTY DAMAGE	$1,000,000 COMBINED SINGLE LIMIT EACH OCCURRENCE $3,000,000 COMBINED SINGLE LIMIT IN THE AGGREGATE

Subject to the umbrella policy's various limitations and conditions, Harbor agreed "to indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability" imposed on or assumed by Harnischfeger "for damages on account of" personal injury

and property damage "caused by or arising out of each occurrence happening anywhere in the world during the policy period." Under the heading "Limit of Liability," the contract provided as follows:

> The Company [Harbor] hereon shall only be liable for the Ultimate Net Loss, the excess of either
>
> (a) the limits of the underlying insurances as set out in the attached schedule in respect of each occurrence covered by said underlying insurances;
>
> or (b) $25,000 Ultimate Net Loss in respect of each occurrence not covered by said underlying insurances;
> (hereinafter called the "underlying limits");
>
> . . . .
>
> In the event of reduction or exhaustion of the aggregate limits of liability under said underlying insurance by reason of losses paid thereunder, this Policy, subject to all the terms, conditions and definitions hereof, shall
>
> (1) in the event of reduction of pay the excess of the reduced underlying limit;
>
> (2) in the event of exhaustion continue in force as underlying insurance.

Important terms in the Harnischfeger/Harbor policy were defined like this:

> OCCURRENCE
>
> The term "Occurrence" wherever used herein means an accident, including continuous or repeated exposure to conditions, which results in personal injury, property damage or advertising liability neither expected nor intended from the standpoint of the Insured.
>
> . . . .

DAMAGES

The term "Damages" includes damages for death and for care and loss of services resulting from personal injury and damages for loss of use of property resulting from property damage.

ULTIMATE NET LOSS

The term "Ultimate Net Loss" shall mean the total sum which the Insured, or his Underlying Insurers as scheduled, or both, become obligated to pay by reason of personal injuries, property damage or advertising liability claims, either through adjudication or compromise, and shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal bonds, interest, expenses for doctors, lawyers, nurses and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Insured's or of any underlying Insurer's permanent employees.

The Company shall not be liable for expenses as aforesaid when such expenses are included in other valid and collectible insurance.

The Harnischfeger/Harbor policy was subject to the following conditions, among others:

NOTICE OF OCCURRENCE

Whenever the Insured has information from which the Insured may reasonably conclude that an occurrence covered hereunder involves injuries or damages which, in the event that the Insured should be held liable, is likely to involve this Policy, notice shall be sent . . . .

ASSISTANCE AND CO-OPERATION

The Company shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Insured but the Company shall have the right and shall be given the opportunity to associate with the Insured or the Insured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves, or appears reasonably likely to involve the Company, in which event the Insured and the Company shall co-operate in all things in the defense of such claim, suit or proceeding.

LOSS PAYABLE

Liability under this Policy will [sic] respect to any occurrence shall not attach unless and until the Insured, or the Insured's underlying Insurer, shall have paid the amount of the underlying limits on account of such occurrence. The Insured shall make a definite claim for any loss for which the Company may be liable under the Policy within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the Insured or after the Insured's liability shall have been fixed and rendered certain either by a final judgment against the insured after actual trial or by written agreement . . . .

OTHER INSURANCE

If other valid and collectible insurance with any other insurer is available to the Insured covering a loss also covered by this Policy, other than insurance that is specifically stated to be excess of this Policy, the insurance afforded by this Policy shall be in excess of and shall not contribute with such other insurance. Nothing herein shall be construed to make this Policy subject to the terms, conditions and limitations of other insurance.

MAINTENANCE OF AND RESTRICTIONS IN UNDERLYING INSURANCES

It is a condition of this Policy that the Policy or Policies referred to in the attached "Schedule of Underlying Insurances" shall be maintained in full effect during the Policy period without reduction of coverage or limits except for any reduction of the aggregate limit or limits contained therein solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this Policy. Failure of the Named Insured to comply with the foregoing shall not invalidate this Policy but in the event of such failure, the Company shall only be liable to the same extent as it would have been had the Named Insured complied with the said condition.

During the 1980-81 policy year, Harnischfeger and Employers Insurance of Wausau had an arrangement whereby Employers would administer Harnischfeger's product liability claims. Harnischfeger's corporate risk manager described the Harnischfeger/Employers contract in an affidavit: "While the fronting paper [the contract between Harnischfeger and Employers] looks like an insurance policy, it does not provide any true insurance because Harnischfeger is obligated under the terms of the policy to reimburse Wausau for any payments made for either attorneys' fees or settlement." In an endorsement to this quasi-policy, the limits of liability provisions were amended to change the word "damages" to "damages and allocated claim expenses." In turn, "allocated claim expenses" were defined by this endorsement to mean legal fees, costs, and related expenses. The limit of liability under the Employers "policy" was $1,000,000 for each occurrence and $3,000,000 in the aggregate.

Documents submitted by Harnischfeger show that Harbor knew that Employers would be administering Harnischfeger's self-insurance. The record does not show

whether Harbor knew that Employers and Harnischfeger would count attorney's fees in reaching the underlying plan's limit of liability. In a counterclaim, Harbor alleges that the Employers/Harnischfeger contract had a "non-standard endorsement" which was "unbeknownst" to Harbor and "contrary to the representation on [Harnischfeger's] application for insurance with [Harbor]."

DISCUSSION

Because my jurisdiction is based on diversity of citizenship, I will apply Wisconsin contract law. The material facts are not disputed, so a decision on summary judgment is appropriate.[1] The construction of an insurance policy is a question of law. *Jones v. Sears Roebuck & Co.*, 80 Wis. 2d 321, 327, 259 N.W.2d 70 (1977).

Wisconsin adheres to three fundamental principles in insurance cases. First, the entire policy should be considered to ascertain the true intent of the parties and the policy's coverage. *Limpert v. Smith*, 56 Wis. 2d 632, 639, 203 N.W.2d 29 (1973). Second, "any ambiguity or obscurity in the language must be construed against the insurance company which drafted the policy and any provision tending to limit the liability of the insurance company should be construed most strongly against the insurance company." *Insurance Company of North America v. Uni-*

[1] The disagreement over Harnischfeger's ostensible misrepresentation on the Harbor insurance application is not material. The application was not made a part of the policy. As a result, the alleged misrepresentation would not affect Harbor's obligations. § 631.11(1), Wis. Stat. Similarly, Harbor's possible knowledge of how Harnischfeger and Employers would count attorney's fees could not "effect a waiver or change in any part of this Policy," according to the "Changes" clause of the umbrella policy.

versal Mortgage Corporation of Wisconsin, 82 Wis. 2d 170, 178, 262 N.W.2d 92 (1978). At the same time, a court should not rewrite the policy to bind an insurer to a risk it did not contemplate. *Id.* Strict construction does not permit strained construction. *Bulen v. West Bend Mutual Insurance Co.*, 125 Wis. 2d 259, 264, 371 N.W.2d 392 (Ct. App. 1985).

Applying these standards to the contract in front of me, I find that Harnischfeger/Harbor policy did not contemplate that legal fees would be counted toward exhaustion of the underlying insurance limit.

The umbrella policy declared that "[n]othing herein shall be construed to make this Policy subject to the terms, conditions and limitations of other insurance." Consequently, Harbor was not bound by the math used in the Employers quasi-insurance policy. Moreover, the agreement between Employers and Harnischfeger was a matter of administrative convenience for Harnischfeger. Their contract did not somehow provide Harnischfeger with additional underlying insurance, as Harnischfeger's own risk manager acknowledged.

I reject Harnischfeger's argument that Harbor should be bound by the terms of the Harnischfeger/Employers contract because Harbor could have inquired into those terms. Not only did Harnischfeger agree to the provision just quoted, but Harnischfeger made a conscious decision to self-insure with respect to products liability claims. Its decision was announced on the "Schedule of Underlying Policies." Thus, Harbor had no reason to inquire into the details of Harnischfeger's arrangement with Employers. If I am to find Harbor liable for excess coverage after Harnischfeger spent $3,000,000 including attorney's fees, my decision would have to be based on the language of the Harnischfeger/Harbor policy itself.

What was there in the policy that supports Harnischfeger's position? Harnischfeger emphasizes the word "limits" on the sections entitled "Loss Payable" and "Limit of Liability." The "Loss Payable" section provided that attachment would occur after Harnischfeger "shall have paid the amount of the underlying limits on account of [any] occurrence." The latter section limited Harbor's liability to "the Ultimate Net Loss, the excess of . . . the limits of the underlying insurances," which in this instance was self-insurance. According to Harnischfeger, the schedule's declared limits—$1,000,000 for each occurrence and $3,000,000 in the aggregate—did not specify whether attorney's fees were included, so there is an ambiguity that must be construed against Harbor.[2] In addition, Harnischfeger points out that Ultimate Net Loss is defined as including attorney's fees.

But Harnischfeger's reading of the contract is strained. The fact that Harbor agreed to pay Harnischfeger's attorney's fees once the attachment point was reached does not mean that Harbor wanted attorney's fees to lower the attachment point in the first place. Harbor was not being inconsistent in providing *umbrella* coverage for attorney's fees, on the one hand, and declining to cover the insured's first-line defense costs, on the other. The risks are different (and presumably reflected in the cost of the excess policy's premium).

Nor am I persuaded by Harbor's alleged failure to clarify if attorney's fees were to be counted in exhausting the

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[2] The schedule's reference to a "combined single limit" is not particularly important. The phrase refers to one limit covering both personal injury and property damage. By way of comparison, a standard auto insurance policy provides separate limits for personal injury to each victim, for each accident, and for property damage per accident (*e.g.*, 25/50/50).

underlying limit. The key word here is "occurrence." The policy stated that Harbor would begin picking up the tab after Harnischfeger had reached a $1,000,000 "limit each occurrence" or $3,000,000 in the aggregate. The same word, "occurrence," appears in the "Limit of Liability" and "Loss Payable" sections. Since the word "occurrence" is largely synonymous with "accident," according to the policy, I surmise that attachment would not obtain until Harnischfeger had expended $1,000,000 per accident. And I interpret this to mean $1,000,000 in indemnity—an interpretation supported by other policy language.

For example, one provision required Harnischfeger to notify Harbor whenever Harnischfeger believed "that an occurrence covered hereunder involves *injuries or damages* which, in the event that the Insured should be held liable, is likely to involve this Policy . . . ." Another provision required Harnischfeger to maintain underlying insurance in full effect "except for any reduction of the aggregate limit or limits contained therein solely by payment of *claims* in respect of accidents and/or occurrences . . . ." The "Loss Payable" provision, cited by Harnischfeger, speaks in terms of reimbursement for judgments and settlements:

> The Insured shall make a definite claim for any loss for which the Company may be liable under the Policy within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the Insured or after the Insured's *liability* shall have been fixed and rendered certain either by a final *judgment* against the insured after actual trial or by written *agreement* . . . . (Emphasis added).

My understanding of the policy is also bolstered by the very first provision, entitled "Coverage." There, Harbor agreed to reimburse Harnischfeger "for all sums which

the Insured shall be obligated to pay by reason of the *liability* [imposed or assumed] for *damages* on account of [personal injuries and property damage] caused by or arising out of each *occurrence* . . . ." In other words, Harbor said it would indemnify Harnischfeger for money that Harnischfeger paid as damages.[3] *Cf. Molina v. United States Fire Insurance Co.*, 574 F.2d 1176, 1178 (4th Cir. 1978) (interpreting similar language, court finds that excess insurer had no obligation to reimburse insured "absent any *judgment* in excess of $100,000.00").

Apart from the contract language, my decision advances important equitable, or economic, policies. Excess insurers must be able to predict accurately when their liability will attach. Conversely, insureds should not be permitted to lower attachment points (and thereby increase the umbrella carriers' risks) by reducing underlying insurance. *See, e.g., Garmany v. Mission Insurance Co.*, 785 F.2d 941, 947 (11th Cir. 1986) (excess insurer should not be subjected to "unforeseeable and variable risks depending on the underlying insurance"). Harnischfeger is essentially asking me to reduce the attachment point by the amount of attorney's fees it expended in defending against claims covered by the underlying self-insurance. But Harbor had no control over such expenditures, except to the extent that Harnischfeger was forced to defend against claims "reasonably likely to involve" Harbor. Thus, Harbor could not have predicted when its liability would attach, unless

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[3] I suppose that a more ambiguous reading could be rendered by concentrating on the words "*all* sums" and "*arising out of* each occurrence," but "[c]ontracts of insurance should not be construed through the magnifying eye of a technical lawyer, but rather from the standpoint of what an ordinary man would believe the contract to mean." *Handel v. American Farmers Mutual Casualty Co.*, 79 Wis. 2d 67, 77, 255 N.W.2d 903 (1977).

all claims were likely to involve Harbor—a scenario that is illogical but which seems to follow from Harnischfeger's reasoning.

(Interestingly, there is a line of cases holding that excess insurers have no obligation to contribute to the insured's defense costs even though the claim against the insured may be for a sum in excess of the primary coverage. *See Signal Cos. v. Harbor Insurance Co.*, 165 Cal. Rptr. 799, 612 P.2d 889, 894 (1980). *See also Nabisco, Inc. v. Transport Indemnity Co.*, 143 Cal. App. 3d 831, 192 Cal. Rptr. 207, 209 (Ct. App. 1983) (umbrella insurer need not reimburse defense costs incurred by insured that maintained self-insurance as underlying coverage).)

For all of the foregoing reasons, then, Harbor's motion for partial summary judgment is GRANTED and Harnischfeger's motion for partial summary judgment is DENIED. I find that the Harbor policy kicked in only after Harnischfeger, either directly or through Employers, paid out $1,000,000 in products liability claims per occurrence or $3,000,000 in products liability claims overall.

I think my decision disposes of this case,[4] although there remains a counterclaim by Harbor that is probably moot. To ensure that no party is ushered out of the courthouse prematurely, I will not enter a formal judgment dismissing the complaint until ten days have passed so that anyone who wants to object will have time to do so.

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[4] I am dismissing as moot Harnischfeger's motion to strike from the record Harbor's references to a pending state case, *Republic Insurance Co. v. Harnischfeger Corp.* Although Harbor's attorney basically rewrote Republic's brief from that dispute, I have paid no heed to his references to facts or holdings from the state case.

Dated at Milwaukee, Wisconsin this 8 day of March, 1989.

BY THE COURT:

/s/ TERENCE T. EVANS
TERENCE T. EVANS
UNITED STATES DISTRICT JUDGE

[FILED MARCH 23, 1990]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

HARNISCHFEGER CORPORATION,

Plaintiff,

v.

Civil Action
No. 87-C-958

HARBOR INSURANCE COMPANY,

Defendant.

ORDER

Several motions are ready to be decided in this case: Harnischfeger Corporation's motion to reconsider my March 8, 1989, decision; Harbor Insurance Company's motion for summary judgment; and Harnischfeger's motion to strike Robert Gundrum's affidavit.

First, Harnischfeger asks that I reconsider my grant of partial summary judgment in favor of Harbor based on an unpublished Wisconsin Court of Appeals decision in *Republic Insurance Company v. Harnischfeger Corp.*, No. 88-1817 (June 21, 1989). There are two problems with this request. First, the decision is unpublished and without precedential value, according to the Wisconsin Rules of Appellate Procedure. Also, I don't believe using an unpublished opinion as "evidence" of what Wisconsin law should be permitted when citing it as precedent would be taboo.

Second, the holding in the unpublished opinion, that the unambiguous policy terms called for attorneys' fees to be

included when calculating the attachment point, would not dispose of this case anyway. Here, although there was reference to the underlying insurance, the umbrella policy also specifically stated that it was not subject to the terms, conditions, and limitations of other insurance.

Accordingly, the motion to reconsider the March 8, 1989, decision is DENIED.

Harbor moves for summary judgment holding that it is entitled to recover monies it paid in error. Harnischfeger opposes the motion, arguing that Harbor is not entitled to recover the amounts paid because it made a mistake of law in construing the insurance contract or, in the alternative, that its change of position makes it inequitable to force Harnischfeger to return the overpayment.

An insurer is not entitled to recover a payment which it makes under a mistake of law. *Terra Nova Insurance Co. v. Associates Commercial Corp.*, 697 F. Supp. 1048, 1051 (E.D. Wis. 1988) (interpreting Wisconsin law) (quoting 18 Couch, Anderson & Rhodes, *Couch on Insurance 2d* §§ 74:191-205 (rev. ed. 1983)). If, however, an insurer pays a loss because of a mistake of fact or because it was induced by fraud to do so, the money may be recovered, if the insurer shows that it was not aware of the true facts when it paid the loss and could not have learned the true facts with reasonable diligence. *Id.*

Frankly, I am not sure whether Harbor made the payments because of a mistake of law or of fact. In order to know for sure, I would have to know what was in the minds of the persons involved in making the payment. I am sure, though, that whether it was a mistake of fact or of law, Harbor is not entitled to recover what it paid out.

If Harbor interpreted the contract so that the calculation of the point of attachment included defense costs, that was a mistake of law. If that was the case, it is an easy question: Harbor is clearly not entitled to recover.

If Harbor made a mistake of fact, relying on Harnischfeger's representation that the attachment point had been reached (without adding in the legal fees), the question is a little more difficult. The inquiry then is whether Harbor has shown that it did not know that the attachment point had not been reached and that it could not have learned that fact by reasonable diligence.

Harbor has not attempted to do so, nor could it, in light of Exhibits A and B-1 attached to Jeffrey Meyer's affidavit. Those two letters and computer printouts show that, whether it realized it or not, Harbor had the information to disabuse itself of any mistake of fact. Both letters clearly state that Harnischfeger's point of attachment includes litigation expenses. The computer printouts list the settlements and judgments in a separate column from the defense expenses.

Harbor says it relied on Harnischfeger's representations. However, it was clear, even from a cursory reading of Exhibits A and B-1, how Harnischfeger was calculating the attachment point. It made no attempt to hide or obscure the calculation. Harbor does not attempt to refute or explain away the letters.

Additionally, Harnischfeger did make a "change of position," in a sense (although probably not in the technical sense of the defense), based on Harbor's payments. It may be more accurate to say that it did *not* change its position in reliance upon Harbor's payments. Had Harbor notified Harnischfeger, when the first letter claimed the attachment point had been reached, that its position was

that legal fees should not be included in the calculation, Harnischfeger could have acted to protect itself by filing a declaratory judgment action and/or procuring additional insurance. Certainly the cost of insurance would have been substantially less than the more than $2 million it is now being asked to pay Harbor.

If Harnischfeger had tried to mislead Harbor about its calculations, the equities would have gone the other way. But, when confronted with the facts and calculations, if Harbor thought Harnischfeger was not entitled to payment it was up to Harbor to say so.

Accordingly, I DENY Harbor's motion for summary judgment. Harnischfeger has not formally moved for summary judgment on the counterclaim, but I will, on my own motion, GRANT summary judgment on Harbor's counterclaim. The motion to strike is, of course, mooted by my decision.

SO ORDERED at Milwaukee, Wisconsin, this 23 day of March, 1990.

BY THE COURT:

/s/ TERENCE T. EVANS
TERENCE T. EVANS
UNITED STATES DISTRICT JUDGE

[DATED AND RELEASED JUNE 21, 1989]

No. 88-1817

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

REPUBLIC INSURANCE COMPANY,

Plaintiff-Respondent,

v.

HARNISCHFEGER CORPORATION,

Defendant-Appellant,

MARSH & McLENNAN, INC.,
CLANTON & CO., and
NBA EXCESS & SURPLUS LINES, INC.,

Defendants.

APPEAL from a judgment of the circuit court for Milwaukee county: LEE E. WELLS, Judge. *Reversed and cause remanded.*

Before Moser, P.J., Sullivan and Fine, JJ.

SULLIVAN, J. Harnischfeger Corporation (Harnischfeger) appeals from a judgment that granted summary judgment to Republic Insurance Company (Republic) upon its request for declaratory relief. The principle question is whether the attachment point[1] of Republic's $10,000,000 products liability umbrella policy, which was issued to Harnischfeger, includes defense costs. Because Republic's umbrella policy incorporates the provisions of Harnisch-

[1] The attachment point is the point at which Republic's umbrella policy begins to provide indemnity in excess of primary coverage or self-insurance.

feger's self-insured retention (SIR), which includes defense costs, we conclude that Republic's attachment point also includes them. Accordingly, we reverse.

For many years, Harnischfeger had engaged in the business of manufacturing construction and mining equipment and industrial and electrical cranes. Several years ago it determined that the cost of primary products liability insurance exceeded what it could provide by self-insuring. Harnischfeger structured its self-insurance program to include attorney fees and other costs. This arrangement permitted it to exactly predict its exposure for a given period. Since 1979, Harnischfeger has self-insured against products liability to the limit of $1,000,000 per occurrence, and maintained either $3,000,000 or $2,000,000 in aggregate coverage per year. From 1979 to 1983, to assuage distributors' and dealers' trepidation about Harnischfeger's solvency, Employers Insurance of Wausau (Employers) provided a "fronting"[2] policy which insured the SIR but required reimbursement by Harnischfeger. In 1982, Harbor Insurance Company provided an umbrella policy, or excess insurance, to Harnischfeger.

Marsh & McLennan, Inc. (Marsh), an international insurance broker, was familiar with Harnischfeger's insurance affairs. It facilitated the change in the existing umbrella policy. Marsh was aware that in 1979, Employers had issued

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[2] Employers' fronting agreement defined Harnischfeger's SIR to include, beside damages, "allocated claims expenses." Employers' policy defined these to include "legal fees, costs and expenses" plus investigation and settlement costs, but not to include adjusters fees or salaries of ordinary Harnischfeger employees. A "fronting" paper actually provides minimal, if any, insurance to the insured. An endorsement in Employers' 1982 policy required Harnischfeger to reimburse Employers up to $950,000 of reimbursable expenses per occurrence and all of the $3,000,000 aggregate coverage.

to Harnischfeger the "fronting" paper with $1,000,000 to $3,000,000 limits covering the risk of third-party product liability claims. Employers' policy also provided that Harnischfeger's SIR included defense costs; i.e., the $1,000,000 to $3,000,000 SIR would be exhausted and thus trigger the effectiveness of the umbrella coverage when products liability judgments and/or settlements plus defense costs reached the retention limits.

Marsh processed Harnischfeger's application for excess insurance with Republic, which issued a $10,000,000 umbrella policy for the policy year commencing November 1, 1982, and subsequently renewed for policy years 1983 and 1984.[3] The umbrella policy contained the following provision for Harnischfeger's retained insurance:

> It is understood and agreed that Item No. 3 of the Declarations, Underlying Insurance, shall read as follows:
>
> . . .
>
> | PRODUCTS LIABILITY | BODILY INJURY & PROPERTY DAMAGE |
> |---|---|
> | (Self-Insured) | Combined Single Limit
$1,000,000.00 each Occurrence
$3,000,000.00 aggregate |

On May 23, 1985, a product liability action was filed in Idaho alleging negligence and strict liability on the part of Harnischfeger, and demanding $5,370,000 in damages. The case was eventually settled for $1,500,000. Republic and Harnischfeger agreed that Republic would pay $500,000 of the 1.5 million dollar settlement, plus $300,000 in attorney's fees. However, Republic reserved the right to contest the amount paid for attorney's fees.

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[3] Harnischfeger's aggregate for the first year was $3,000,000; for the last two years, $2,000,000.

On June 10, 1986, Republic started this action, seeking a declaratory judgment concerning the terms of the policy. On March 16, 1987, Republic filed an amended complaint which restated the initial declaratory complaint and added claims of misrepresentation. Harnischfeger moved for summary judgment on April 22, 1988, on all claims. Republic filed a cross-motion for partial summary judgment, but only with respect to the declaratory relief action. The trial court granted Republic's summary judgment motion on August 23, 1988. The trial court held that Republic's policy provided coverage for the stated risks only after judgments and/or settlements exceeded the retention limits and that the defense costs did not factor into the calculation.

The issue on appeal is, at what point did Republic's umbrella policy attach? Republic argues that the only losses which serve to reduce its attachment point are those involving payment of "claims" based on judgments or settlements, and that they do not include defense costs.[4] Harnischfeger argues that a plain reading of the umbrella's "Loss Payable" provision, referencing maintenance of the SIR limited only by payment of "claims," unambiguously includes defense costs.

STANDARD OF REVIEW

We review a grant of summary judgment by applying the standards set forth in sec. 802.08(2), Stats., in the

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[4] Republic relies on the following language found in Condition 17, Maintenance of Underlying Insurance:

> The [underlying] policy or policies set forth in the Declarations as underlying insurance shall be maintained . . . except for any reduction of aggregate limits contained therein solely by payment of claims for occurrences . . . .

same manner as the circuit court. *Kohnke v. St. Paul Fire & Marine Ins. Co.*, 144 Wis. 2d 352, 357-58, 424 N.W.2d 191, 194 (1988). Under sec. 802.08(2), Stats., summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816, 820 (1987) The purpose of summary judgment is to determine whether a legal dispute can be resolved short of trial. *Bulgrin v. Madison Gas & Elec. Co.*, 125 Wis. 2d 405, 407-08, 373 N.W.2d 47, 49 (Ct. App. 1985).

COVERAGE

Interpretation of an insurance contract is controlled by general principles of contract construction. *Lambert v. Wrensch*, 135 Wis. 2d 105, 115, 399 N.W.2d 369, 373 (1987). The interpretation of an insurance policy presents a legal issue which we review independently without deference to the trial court's conclusions. *Lechner v. Scharrer*, 145 Wis. 2d 667, 672, 429 N.W.2d 491, 494 (Ct. App. 1988). If the terms of a contract are unambiguous, we will construe them according to their terms, even though the parties have placed a different construction on them. *Kreinz v. NDII Secs. Corp.*, 138 Wis. 2d 204, 216, 406 N.W.2d 164, 169 (Ct. App. 1987).

We conclude that the unambiguous terms of Republic's Declarations and Limits of Liability provisions, which incorporated Harnischfeger's SIR, include Harnischfeger's legal fees and related defense costs as part of Republic's "claims," thereby triggering its attachment. Instead of defining the attachment point, Republic's policy referred

to "underlying insurance," i.e., Harnischfeger's SIR, or Employers' "fronting papers," which specifically included legal fees as part of its allocated claim expenses.

Republic's policy contains an insuring agreement which indemnifies Harnischfeger "subject to the limits of liability, exclusions, conditions and other terms of this policy." The "coverages" section of the policy states that Republic will indemnify Harnischfeger

> for all sums which [Harnischfeger] shall be obligated to pay by reason of the liability imposed upon [it] by law or liability assumed by [it] under contract or agreement for damages, and expenses, all as included in the definition of "ultimate net loss,"[5] because of:
>
> (a) personal injury,
>
> (b) property damage, and
>
> (c) advertising liability,
>
> as defined herein and caused by or arising out of an occurrence anywhere in the world.

The coverage section is expressly limited by the provisions set forth in the declarations, limits of liability, and policy terms. Endorsement 1, as it relates to products liability, states:

> "It is understood and agreed that item No. 3 of the Declarations, Underlying Insurance, shall read as follows:
>
> . . .

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[5] Republic's policy defines the term "ultimate net loss" as "the total sum which the *Insured, or* any company as his *insurer,* or both, becomes legally obligated to pay as damages, because of personal injury, property damage or advertising liability claims . . . and shall also include . . . *expenses for* . . . *lawyers* . . . which are paid as a *consequence of any occurrence* covered hereunder . . . ." [Emphasis added.]

PRODUCTS LIABILITY	BODILY INJURY & PROPERTY DAMAGE
(Self-Insured)	Combined Single Limit $1,000,000.00 each occurrence $3,000,000.00 aggregate

The policy next provides exclusions, not material here, and finally, conditions. Condition 5 provides in part:

> Limits of Liability. The company shall only be liable for *ultimate net loss* in excess of either:
>
> (a) except as provided in sub-paragraph (b) hereof, *the applicable limits of liability of the policies of underlying insurance* set forth in Item 3 of the Declarations; or
>
> (b) as respects each occurrence not covered by such underlying insurance, or where each occurrence is covered by such underlying insurance but in recoverable amounts less than the Underlying Limits set forth in Item 4 of the Declarations, the amount of ultimate net loss set forth in the Declarations as "Underlying Limits,"
>
> but in no event shall the company be liable for an amount in excess of the applicable limit set forth in Item 5 of the Declarations. [Emphasis supplied.]

Condition 5 contains additional language defining the attachment point:

> In the event of reduction or exhaustion of the aggregate limits of liability under the policies of underlying insurance by reasons of losses paid thereunder, this policy shall:
>
> (i) in the event of reduction, pay the excess of the reduced underlying insurance, and
>
> (ii) *in the event of exhaustion, continue in force as underlying insurance* . . . . [Emphasis added.]

Also, Condition 11, Loss Payable, provides in part:

> Liability under this policy with respect to any occurrence shall not attach unless and until the Insured, *or the Insured's underlying insurer,* shall have paid the amount of the *underlying limits* on account of such occurrence. [Emphasis supplied.]

Endorsement 1 and Conditions 5 and 11 make it crystal clear that Republic's umbrella policy attaches when the underlying insurance is exhausted. Republic's policy placed no limitations upon the elements of the underlying insurance with respect to claims, defense costs, or damages.

We now turn to the "underlying insurance" policy provided by Employers. The policy provided $950,000 coverage per occurrence, and $3,000,000 aggregate coverage. A reimbursement endorsement required Harnischfeger to pay reimbursable expenses within ten days of demand by Employers. The "allocated claims expenses" endorsement contained the following definitions:

> 1. Limits of Liability. The "limits of liability" provisions are amended by changing the word "damages" to read "damages and allocated claim expenses."
>
> 2. Defense Coverage. The insuring agreements are amended to provide that the company shall not be obligated to pay any claim or judgment or defend any suit or to incur or pay any allocated claim expenses, after the applicable limit of the company's liability has been exhausted by payments made or expense incurred for judgments, settlements, or allocated claim expenses.
>
> 3. Definition of "allocated claim expenses." The term "allocated claim expenses" *means legal fees, costs and expenses,* and any other fees, costs or expenses incurred by the insured at the company's request for the investigation, adjustment, settlement and defense of claims or suits, excluding adjuster's fees and ex-

> penses and salaries of regular employees and officers of the company. [Emphasis supplied.]

Although Employers' coverage applied only to Republic's first umbrella year, Harnischfeger continued its SIR the following two umbrella years with the aggregate coverage reduced to $2,000,000. The reimbursement provision required Harnischfeger to pay Employers, *inter alia*, for its legal fees, costs and expenses. These were part of Harnischfeger's SIR, and were incorporated by Republic into its umbrella policy.

REPUBLIC'S ARGUMENTS

Republic argues that its policy did not contemplate a reduction to occurrence or the aggregate coverage by Harnischfeger's defense costs, and that Harnischfeger's interpretation of the umbrella is based on irrelevant provisions.

Republic reasons that policy Condition 5, Limits of Liability, creates liability only for "an ultimate net loss" in excess of the SIR. Further, it argues that Condition 11, Loss Payable, prevents liability from attaching until the SIR is paid. Because policy definitions of "personal injury," "property damage," and "occurrence" do not include defense costs, Republic deduces that its umbrella is unaffected by the defense costs of Harnischfeger's SIR. We reject Republic's attempt to escape the plain import of Conditions 5 and 11, which tie ultimate net loss and loss payable, respectively, to the underlying SIR. Neither condition excludes defense costs as part of the SIR.

Likewise, Republic's reliance upon Condition 17, Maintenance of Underlying Insurance, is unpersuasive.[6] Republic asserts that Harnischfeger's duty to maintain its SIR, except for "payment of claims for occurrences," excludes defense costs. Nothing is found in the policy exclusions or in the definition of "occurrences" to support Republic's position. We decline Republic's invitation to rewrite the policy to limit the meaning of "claims" to property damage or personal injury.

We likewise reject Republic's position that Condition 10, Appeals, manifests an agreement to exclude defense costs.[7] The "judgment" from which Republic could appeal, it argues, could not include defense costs because attorney fees are not included as items of litigation costs.[8] Hence,

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[6] Condition 17 states:

> Maintenance of Underlying Insurance. The policy or policies set forth in the Declarations as Underlying Insurance shall be maintained in full effect during the period this policy remains in force except for any reduction of the aggregate limits contained therein *solely by payment of claims for occurrences* which take place during this policy period. Failure of the Insured to comply with the foregoing shall not invalidate this policy but in the event of such failure, the company shall only be liable to the same extent as it would have been if the Insured had complied with this condition. [Emphasis added.]

[7] Condition 10 states:

> Appeals. In the event the Insured or the Insured's underlying insurer(s) elect not to appeal a judgment in excess of the underlying limits, the company may elect to make such appeal at its own cost and expense, and shall be liable for the taxable costs, disbursements and interest on judgments incidental thereto, but in no event shall the liability of the company for ultimate net loss exceed the limit of its liability stated in this policy and, in addition, the cost and expense of such appeal.

[8] Section 814.04(1), Stats., provides that attorney fees may be allowed as costs at a maximum of $100.00.

Republic concludes, it could not appeal a judgment in excess of the SIR if defense costs caused the SIR limit to be exceeded. This argument confuses apples and oranges. A successful plaintiff's judgment in a products liability action against Harnischfeger would not include attorneys' fees because absent a statute or contractual provision, costs of litigation, particularly attorneys' fees, are only recoverable as provided by ch. 814, Stats. *See Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 435, 265 N.W. 2d 513, 527 (1978). Any appeal, including that taken by Republic pursuant to its authority under Condition 10, would be from that judgment. Although Republic has, apparently, limited its right to appeal to circumstances where the "judgment [is] in excess of the underlying limits," it has, however, specifically contracted with Harnischfeger to count attorneys' fees in connection with the products liability action to which Harnischfeger's self insurance applies in computing the attachment point for the umbrella coverage.[9]

As reiterated in *Western Casualty & Sur. Co. v. Budrus*, 112 Wis. 2d 348, 351, 332 N.W.2d 837, 839 (Ct. App. 1983), we apply unambiguous policy terms in accord with the parties' agreement without resort to rules of construction. Republic's umbrella specifically incorporated Harnischfeger's SIR, which included legal fees, costs, and expenses. This court is not free to declare their exclusion from Republic's umbrella policy.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.

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[9] Since the issue is not before us, we take no position as to whether the amount of attorneys' fees would be added to the amount of the judgment in order to compute when Condition 10 authorizes Republic to appeal.

Supreme Court, U.S.
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No. 91-173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HARNISCHFEGER CORPORATION,

Petitioner,

v.

HARBOR INSURANCE COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal court, sitting in diversity, must follow a state's law which prohibits the citation of unpublished opinions which have no precedential value.

2. Whether the Seventh Circuit Court of Appeals correctly applied Wisconsin law concerning restitution of payments made by mistake.

LIST OF PARTIES

The parties to the proceeding below were the petitioner Harnischfeger Corporation and the respondent Harbor Insurance Company.

RULE 29.1 STATEMENT

Harbor Insurance Company was sold on December 14, 1990 to NAC Reinsurance Corporation. All of Harbor's insurance policy obligations which existed prior to December 14, 1990 have been fully assumed by Continental Insurance Company. Continental Insurance Company is a subsidiary of The Continental Corporation. The following companies are non-wholly owned subsidiaries of Continental Insurance Company and The Continental Corporation: Underwriters Re Acquisition Corporation, First Insurance Co. of Hawaii, Ltd., Saudi Continental Insurance Co., Ltd., Associated Aviation Underwriters, Accord Holdings, Inc., First Fire and Marine Insurance Co., Ltd., United Continental Insurance Stn Bhd, Malayan Overseas Insurance Corp., Lombard General Insurance Co., Ltd., Asia Insurance Co. Limited, Intercontinental Seguradora S.A. and Connaught Insurance Co. Limited.

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STATUTES INVOLVED

28 U.S.C. sec. 1652. State Laws As Rules of Decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Wisconsin Rule of Appellate Procedure 809.23(3)

An unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of res judicata, collateral estoppel, or law of the case.

Wisconsin Rule of Appellate Procedure 809.24(4)

A person may at any time request the court to have an unreported opinion published in the official reports. A copy of the request shall be served pursuant to s. 809.80 on the parties to the appeal or other proceeding in which the opinion was filed.

Seventh Circuit Rule 53(b)

(b) *Publication.* The court may dispose of an appeal by an order or by an opinion, which may be signed or *per curiam.* Orders shall not be published and opinions shall be published.

(1) "Published" or "publication" means:

(i) Printing the opinion as a slip opinion;

(ii) Distributing the printed slip opinion to all federal judges within the circuit, legal publishing

companies, libraries and other regular subscribers, interested United States attorneys, departments and agencies, and the news media; and

(iii) Unlimited citation as precedent.

(2) Unpublished orders.

(i) Shall be typewritten and reproduced by copying machine;

(ii) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, and the news media, and shall be available to the public on the same basis as any other pleading in the case;

(iii) Shall be available for listing periodically in the Federal Reporter showing only title, docket number, date, district or agency appealed from with citation of prior opinion (if reported), and the judgment or operative words of the order, such as "affirmed," "enforced," "reversed," "reversed and remanded," and so forth;

(iv) Except to support a claim of res judicata, collateral estoppel or law of the case, shall not be cited or used as precedent.

(a) in any federal court within the circuit in any written document or in oral argument; or

(b) by any such court for any purpose.

No. 91-173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HARNISCHFEGER CORPORATION,

Petitioner,

v.

HARBOR INSURANCE COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Unfortunately, the petitioner's statement of the case is slanted and misleading. Harbor Insurance Company (hereinafter "Harbor") totally disagrees with the characterizations, facts and innuendos set forth in paragraphs three and four of Harnischfeger Corporation's (hereinafter "Harnischfeger") statement of the case in its Petition for Writ of Certiorari. Most importantly, Harnischfeger fails to point out to this Court in its petition that the insurance

policy in this case is substantially different from the insurance policy in the unpublished *Harnischfeger-Republic* case on which it has based its petition. A short and accurate statement of the case follows.

The complaint in this matter was filed on August 18, 1987. It alleged breach of contract, and the basic dispute between the two corporations was the interpretation of an insurance policy. Harnischfeger claims that Harbor owed certain monies to it under an excess policy of insurance for expenses paid by Harnischfeger but within Harbor's layer of coverage.

Harbor answered the complaint admitting the existence of the insurance policy, but denied any monies were due. Harbor filed a Counterclaim and an Amended Counterclaim. These counterclaims sought reformation of the insurance contract and reimbursement for payments mistakenly made prior to the exhaustion of the underlying limits by indemnity payments.

Both parties filed motions for partial summary judgment in October 1988. These motions asked the district court to resolve the insurance coverage dispute concerning the point at which the excess insurance policy was to "attach" or "kick in". Harnischfeger asserted that the excess policy kicked in when the underlying policy limit was met by both indemnity payment of claims and legal fees/defense costs incurred in defending these claims. Harbor moved asking the Court to declare that coverage under the excess policy would kick in only after indemnity payments were made up to the underlying policy limit without regard to legal fees and the defense costs incurred in defending the claims that fell within the underlying limits.

The district court issued a decision and order dated March 8, 1989 which denied Harnischfeger's motions and

granted Harbor's motion. The effect of that decision and order was to declare that the excess insurance policy was to kick in when the underlying policy limit was exhausted by indemnity payments only without regard to legal fees and defense costs. Harnischfeger moved the court to reconsider its decision and order of March 8, 1989 on the basis of an unpublished decision of the Wisconsin Court of Appeals and the court denied that motion.

Harbor moved the court for summary judgment on its counterclaims on January 2, 1990. The counterclaims sought restitution for monies paid due to the mistaken impression Harbor received from Harnischfeger that the underlying aggregate limit had been reached by indemnity payments only when, in fact, that limit had been reached by combining indemnity payments plus legal fees and defense costs paid in defending the claims falling within the underlying limits. The district court, by decision and order of March 23, 1990, denied Harbor's motion for summary judgment and dismissed Harbor's counterclaims. The case was disposed of by these motions, no trial was had, and a final judgment was entered by the clerk on April 30, 1990, which dismissed the Complaint and the Counterclaims.

Both parties timely appealed to the Seventh Circuit. The Seventh Circuit affirmed the district court on the insurance coverage issue stating that legal fees and defense costs could not be combined with indemnity claim payments to reach the underlying policy limit. However, the Court of Appeals reversed the district court on the mistake issue and stated that Harbor could recover payments it had mistakenly made for settlements and judgments and remanded for computation of the sums owed Harbor.

As this case progressed, Harnischfeger petitioned the Publication Committee of the State of Wisconsin Court of Appeals for publication of the *Harnischfeger-Republic*

case. Its petition was denied. The Wisconsin Supreme Court had earlier refused to review the unpublished Court of Appeals decision.

SUMMARY OF THE ARGUMENT

This case does not present issues of significant importance to warrant further review by the United States Supreme Court. Harnischfeger is simply challenging the court of appeals' state law determination which is rarely, if ever, an appropriate subject of this Court's review. Further review of this case is not warranted.

Federal courts, sitting in diversity, must follow state selective publication and non-citation rules, otherwise the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) will be violated. The unpublished decision at issue is entitled to no precedence in Wisconsin and can not be cited pursuant to Wisconsin law and the federal courts must follow the same rule pursuant to *Erie*. The district court and court of appeals correctly refused to give precedential effect to the unpublished decision because of the Wisconsin non-citation rule and because the insurance policy in the unpublished decision is significantly different from the one at issue in this case.

Wisconsin clearly allows one to receive restitution if one has made a mistaken overpayment due to an innocent mistake of law or fact entertained by both parties. The court of appeals correctly followed this law and did not usurp its power. Regardless of whether one classifies the mistake made as one of fact or one of law, the court of appeals has correctly allowed Harbor to receive restitution of the overpayments.

ARGUMENT

I.

THE ISSUES PRESENTED ARE NOT SUFFICIENTLY IMPORTANT TO WARRANT REVIEW BY THIS COURT

The grant of a Writ of Certiorari requires the exercise of this Court's discretionary jurisdiction. "A review of Writ of Certiorari is not a matter of right but of sound judicial discretion. A Petition for a Writ of Certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10.1. This case is not of sufficient importance in the overall structure of the law to merit review by this Court.

In its effort to convince the court of the importance of the case, the petitioner has greatly overstated the reach of the Seventh Circuit's decision. This case is simply a dispute between an insurer and an insured which required the interpretation of the insurance policy and Wisconsin law. This court has stated, ". . . that, standing alone, a challenge to state law determinations by the court of appeals will rarely constitute an appropriate subject of this court's review." *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983). Harnischfeger is simply attacking the Seventh Circuit's construction of Wisconsin law as it relates to the insurance policy and thus this case is not the proper subject for review by this Court.

Also, it does not help Harnischfeger's request to state that an issue in the case, the effect of state publication and non-citation rules in federal court, has not been resolved or addressed by this Court. The fact that a certain issue has never been addressed by this Court is not a recognized basis for the granting of a Petition for Writ of Certiorari.

As Harnischfeger notes in its brief, twenty-six states and all thirteen federal circuits had selective publication rules by 1989. Beyler, *Selective Publication Rules: An Empirical Study*, 21 Loy U. Chi. L.J. 1, 3 (1989). Although these selective publication rules have a common purpose, the rules are not all the same. *See Id.* at 3-6. Some rules prohibit citation altogether, while others say the case is not precedential. Some rules merely discourage citation. Although there has been some confusion by some circuits, for example, the citation of cases with no or limited precedential value, this can be expected when there are different rules. The selective publication rules and non-citation rules are created by the particular state and application of such rules must be left up to the particular states and the applicable court on a case-by-case basis. It is foolhardy to think that this court could announce a rule, with respect to state non-citation rules, as petitioner seems to be requesting in its petition, which would be fair and appropriate to all relevant jurisdictions and under all circumstances. Each state has the right to its own selective publication rule and the federal courts should apply such rules in diversity cases as a state court would.

Harnischfeger states that this Court's direction is needed to determine whether state non-citation rules must be followed in a diversity case. The answer to that question was decided long ago in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). As this Court stated, "the nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a state court a block away should not lead to a substantially different result." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). If a federal court did not have to follow a state non-citation rule, as Harnischfeger hopes for, then *Erie*

R. Co. v. Tompkins would have no further effect and would have to be overruled. This Court stated only last year that, "the *Erie* rule remains a vital expression of the federal system and the concomitant integrity of the separate states." *Ferens v. John Deere Co.*, 494 U.S. 416 (1990). Stated simply, if a state court is forbidden from relying upon and citing to an unpublished opinion, the federal court should be subject to the same rule, otherwise the *Erie* principle is violated. Also, encouragement of forum shopping would be sparked by a rule stating federal courts do not have to follow state non-citation rules.

Although state selected publication and non-citation rules are interesting and somewhat controversial, the issue is not of such significant importance to warrant review by this Court. Furthermore, this Court gave us guidance, over fifty years ago in *Erie R. Co. v. Tompkins* as to whether or not state non-citation rules should be followed. The answer is a simple yes.

II.

THE SEVENTH CIRCUIT CORRECTLY RESOLVED THE NON-CITATION ISSUE AND THE CORRECT RESULT WAS REACHED

The district court refused Harnischfeger's request to have it reconsider its decision in favor of Harbor which correctly determined the attachment point of the insurance policy, based upon the unpublished decision from the Wisconsin Court of Appeals in *Republic Insurance Co. v. Harnischfeger Corp.*, No. 88-1817 (Wis. Ct. App. June 21, 1989), *review denied*, 449 N.W.2d 276 (1989). The district court denied the request on two separate grounds. The first ground was that the decision was unpublished, without precedential value, and should not even be cited

to. The second ground was that the language of the insurance policies were different.

The court of appeals stated that the analysis of the district court was correct. The court of appeals stated that the unpublished decision did not control for two reasons. The first reason was that the Republic Insurance policy contains language which is different from the Harbor policy. The second reason was that the decision was unpublished and entitled to no precedential value.

In Wisconsin, unpublished opinions have no precedential value and are not to be cited as precedent or authority except for a claim of res judicata, collateral estoppel or law of the case. Section 809.23(3), Wis. Stats. Wisconsin lawyers are admonished under pain of possible sanctions not to even cite unpublished opinions. *See, Cole v. Young*, 817 F.2d 412, 420 (7th Cir. 1987), citing *Tamminen v. Aetna Casualty & Surety Co.*, 109 Wis. 2d 536, 327 N.W.2d 55 (1982). *See also City of Madison v. Lange*, 140 Wis. 2d 1, 6 n.2, 408 N.W.2d 763 (Ct. App. 1987) and *Hagen v. Gulrud*, 151 Wis. 2d 1, 8, 442 N.W.2d 570 (Ct. App. 1989) where the courts fined attorneys for citing to unpublished opinions. The Seventh Circuit, in *Cole*, recognized the lowly status of unpublished opinions. *See, Cole, supra* at 420. Finally, the Seventh Circuit, in this case, made the correct conclusion where it stated, "a non-case for Wisconsin's own purposes is a non case in federal courts under *Erie.*" *Harnischfeger Corp. v. Harbor Insurance Co.*, 927 F.2d 974, 976 (7th Cir. 1991). As noted above, this is the correct result if *Erie* is to remain vital.

Furthermore, Wisconsin has recently reviewed its non-citation rules and has decided not to change it. In June of 1990, the Wisconsin Supreme Court denied the State Bar of Wisconsin's petition, which requested a rule change

which would allow unpublished opinions to be cited for persuasive and informational purposes. The Wisconsin Supreme Court stated that the proposal would not correct inequitable access to unpublished decisions, would not correct other associated problems, and it also reasoned that lower courts might give unpublished opinions too much worth. *See, Amendment of Section (Rule) 809.23(3)*, 155 Wis. 2d 832, 456 N.W.2d 783 (1990). Therefore, there is absolutely no question that an unpublished Wisconsin opinion is of no precedential value and must not be cited as precedent or authority except to support a claim of res judicata, collateral estoppel or law of the case.

The Seventh Circuit also has a non-citation rule to unpublished opinions and orders. Pursuant to Seventh Circuit Rule 53, an unpublished order of that court may not be cited or used as precedent in any federal court within that circuit except to support a claim for res judicata, collateral estoppel or law of the case. The reasons for the non-citation rule are to reduce the proliferation of opinions when the publication criteria aren't met. To thus allow an unpublished opinion to be cited as precedent would ignore both the Wisconsin rule and its underlying principles, as well as the rule and underlying principles of Seventh Circuit Rule 53.

Other circuits have also recognized that unpublished opinions are not precedential. *See, In re Leimer*, 724 F.2d 744 (8th Cir. 1984), *Exxon Co. v. Banque de Paris et des Pays-Bas*, 889 F.2d 674 (5th Cir. 1989), *cert. denied* ____ U.S. ____, 110 S. Ct. 3230 (1990). The decision not to publish an opinion usually represents the court's view that the case is without substantial value for precedence purposes.

Wisconsin allows any person at any time to request the court to have an unreported opinion published in the official reports. Section 809.23(4), Wis. Stats. The petitioner,

Harnischfeger, did request the Wisconsin Court of Appeals, by way of motion, to publish the *Republic Insurance Co. v. Harnischfeger Corp.* case. The court of appeals denied Harnischfeger's publication request and this is further support for the result reached below.

Also, it must be noted that Harnischfeger has misquoted *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967). Harnischfeger states at pages 9-10 of its petition, that the *Estate of Bosch* says that all state decisions at a minimum must be given proper regard. The case does not say that, what this court stated is that proper regard must be given to relevant rulings. *Id.* at 465. A case that is not precedential at all can never be considered a relevant ruling to be given proper regard.

Therefore, the Seventh Circuit's decision not to consider the unpublished decision as controlling precedence was correct. Wisconsin and the Seventh Circuit both have non-citation rules to unpublished opinions. As noted above, if the *Erie* rule is to remain vital, the federal courts must follow the particular state non-citation rules. If the federal courts are not required to follow state non-citation rules, the *Erie* rule will be substantially eroded and forum shopping will be greatly encouraged. Furthermore, the Harbor policy and Republic policy have different terms and both the district court and court of appeals recognized this and so the non-citation issue is not as important as Harnischfeger would have one believe.

III.

THE SEVENTH CIRCUIT CORRECTLY APPLIED WISCONSIN LAW CONCERNING MISTAKEN PAYMENTS

Harnischfeger asserts, in its petition, that payments made because of a mistake of law cannot be recovered

under Wisconsin law. Harnischfeger also asserts that the classification of the mistake is extremely important and controlling. These assertions are not correct and misstate Wisconsin law.

Wisconsin follows the rule which states that the classification of the mistake is not controlling. In *In re Brat*, 257 Wis. 447, 43 N.W.2d 817 (1950), the Wisconsin Supreme Court stated that one will not be allowed to enrich himself unjustly at the expense of another by reason of an innocent mistake of law or a fact entertained by both parties. The Wisconsin Supreme Court specifically stated:

> It has been said that the important question is, after all, whether the case falls within the fundamental principle of equity that no one shall be allowed to enrich himself unjustly at the expense of another by reason of an innocent mistake of law or a fact entertained by both parties.

Id. at 453.

Another Wisconsin case which recognizes the return of mistaken payments made under a mistake of law is *City of Milwaukee v. Milwaukee County*, 27 Wis. 2d 53, 133 N.W.2d 393 (1965). Harnischfeger's conclusion that Wisconsin law does not allow recovery for mistaken payments made because of a mistake of law is simply wrong and misleading.

Harnischfeger cited three pre-1906 Wisconsin cases, at page 15 of its petition, for the proposition that under Wisconsin law payments made because of a mistake of law cannot be recovered. Although the holdings of *Gage v. Allen*, 89 Wis. 98, 61 N.W. 361 (1894) and of *Birkhauser v. Schmitt*, 45 Wis. 316 (1878) are consistent with such a rule, none of these three cases, cited by Harnischfeger, announce a black-and-white rule which says payments made

because of a mistake of law cannot be recovered. In fact, the actual rule is set forth in *In re Brat* quoted above that either a mistake of law or fact will allow restitution.

Harnischfeger does correctly point out that in Wisconsin a party who has expended money by mistake of fact may ordinarily recover such sum in an action for money had and received. *See, Amalgamated Association of Street Electric Railway & Motor Coach Employees v. Danielson*, 24 Wis. 2d 33, 128 N.W.2d 9 (1964). Harbor has maintained in both the district court and court of appeals that the mistakes made by it were mistakes of fact. Harbor's mistake in this case was relying on its own insured's factual statements that the underlying policy was exhausted triggering coverage under Harbor's excess policy. Accordingly, Harbor has been correctly allowed to recover its mistaken payments as the mistakes made were mistakes of fact.

Therefore, the Seventh Circuit has properly allowed Harbor to recover the mistaken payments because the mistakes made were mistakes of fact. Even if the mistakes Harbor made were classified as mistakes of law, this does not bar recovery. The Seventh Circuit has not thrown out, as Harnischfeger suggests, relevant Wisconsin law. To the contrary, the Seventh Circuit has correctly followed Wisconsin law and it also correctly notes that Harnischfeger's argument relied primarily on a few ancient cases that were impliedly overruled by the more modern cases, such as *In re Brat, supra*. There was no usurpation of power by the court of appeals as Harnischfeger suggests and so there is no need to review this matter, as this Court generally defers to the determination of state law by the court of appeals. *Cort v. Ash*, 422 U.S. 66, n.6 (1975).

CONCLUSION

The Petition for Writ of Certiorari does not present any issue which warrants review by this Court. The issues presented are questions of state law and the Seventh Circuit Court of Appeals has correctly applied the law of the State of Wisconsin. Harbor, therefore, respectfully requests that this Court deny the Petition for Writ of Certiorari.

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